BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER L. RICKARD	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,021,390
	)	& 1,021,513
NATIONAL GYPSUM COMPANY	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the May 2, 2006, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant has filed two claims for workers compensation benefits. The first alleged period of accident is from September 2003 and each workday afterwards. That claim is the subject of Docket No. 1,021,513. The second alleged period of accident is January 24, 2005, and each workday after that date. That claim is the subject of Docket No. 1,021,390.

In the May 2, 2006, Order, Judge Clark determined Dr. John P. Gorecki should continue as claimant's authorized treating physician and that claimant should continue to receive temporary total disability benefits.

Respondent and its insurance carrier contend Judge Clark erred. They argue claimant is not entitled to receive workers compensation benefits under the earlier claimed accident and that the Judge erred by awarding benefits without considering the compensability of both docketed claims. They maintain:

> Based upon the above arguments, Respondent maintains that the Administrative Law Judge exceeded his jurisdiction in awarding continued medical treatment benefits and temporary total disability benefits referable to both docketed claims, without considering the compensability of both docketed claims. Respondent

> maintains, as above, that Claimant's alleged September, 2003, injury is not compensable under the Workers' Compensation Act and that any treatment necessitated by any condition present prior to January, 2005, should likewise not be the liability of Respondent and carrier.
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> . . . .
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> Further, as the claim relating to the September, 2003, injury is not compensable but was included as a basis for the Administrative Law Judge's Order of benefits, Respondent maintains that such Order must be vacated and that the matter be remanded for further proceedings to determine whether Claimant's need for additional treatment is related to her most recent (compensable) injury in isolation.
>
> WHEREFORE, the Respondent and Carrier respectfully request that the May 2, 2006 Order of Administrative Law Judge Clark be reversed with reference to Docket number 1,021,513 and remanded for further proceedings to determine the relation between Claimant's current request for treatment, the prior non-compensable condition, and the only remaining date of accident, January 24, 2005.[1]

In summary, respondent and its insurance carrier contend the claim for the September 2003 accident must fail as claimant allegedly failed to prove (1) he injured his low back working for respondent, (2) timely notice to respondent of that alleged accident or injury, and (3) timely written claim for benefits. Next, they contend the evidence failed to establish that claimant's present need for medical treatment is related to the later alleged accident. Accordingly, they request the Board to reverse the May 2, 2006, Order and remand these claims to the Judge for further proceedings to determine if claimant's present need for medical treatment is solely related to the alleged January 24, 2005, accident.

Conversely, claimant contends the May 2, 2006, Order should be affirmed. Claimant argues the Board should affirm the Judge's finding from a previous preliminary hearing Order (which was entered by Judge Clark on June 14, 2005, and affirmed by the Board on September 28, 2005) that claimant injured his back in January 2005, while working for respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the May 2, 2006, Order should be affirmed.

[1] Respondent's Brief at 6, 7 (filed May 22, 2006).

Claimant alleges he injured his back working for respondent in September 2003 while unloading hard powder and that he re-injured his back on January 24, 2005, when he stepped onto some uneven ground.

As indicated above, this is the second time these claims come before the Board. Judge Clark initially entered a preliminary hearing Order dated June 14, 2005, in which the Judge concluded claimant injured his back on January 25, 2005,[2] working for respondent. That Order, which this Board later affirmed, reads in pertinent part:

> 1. This Court finds that the Claimant was injured out of and in the course of his employment with the Respondent on January 25 *[sic]*, 2005, when he aggravated a pre-existing condition in his low back.
>
> 2. Temporary total disability payments are ordered paid beginning January 29, 2005, until the Claimant is released.
>
> 3. John P. Gorecki, M.D., is authorized as the Claimant's treating physician. All medical is ordered paid.

Following the June 14, 2005, Order, claimant underwent back surgery.

Respondent and its insurance carrier challenge their responsibility for claimant's ongoing medical treatment and temporary total disability benefits. Accordingly, they requested the May 2, 2006, preliminary hearing. Following that hearing, Judge Clark entered the May 2, 2006, preliminary hearing Order, which merely continued claimant's medical benefits and reinstated his temporary total disability benefits. The Judge did not make any specific findings regarding whether claimant's benefits were related to the first alleged accident or the second.

Claimant did not testify at the May 2006 preliminary hearing but his attorney proffered that claimant had undergone back surgery and his temporary total disability benefits had been terminated. On the other hand, respondent and its insurance carrier's attorney proffered that they had sent claimant to be evaluated by Dr. Paul S. Stein for purposes of these claims.

Only medical records were presented at the second preliminary hearing. Dr. Stein's medical report states he examined claimant on October 28, 2005, and that the doctor concluded the possible need for back surgery was not significantly altered by the January 24, 2005, incident. The doctor wrote, in part:

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[2] Although the ALJ's Order (June 14, 2005) indicates a date of accident of January 25, 2005, the record and the parties' briefs indicate that the correct date of accident is January 24, 2005.

> Mr. Rickard reports a second injury to his back at National Gypsum on 1/24/05. He had been under evaluation by Dr. John Gorecki with consideration of back surgery prior to that date. Shortly before that date, on 1/21/05, Dr. Gorecki was considering the need for lumbar fusion. There is no scientific method for accurately measuring the level of an individual's pain so that I cannot state whether or not the incident of 1/24/05 increased the pain in the lower back. What I can state, within a reasonable degree of medical probability, is that there were symptoms sufficient to consider surgery prior to that date and that there is no evidence of structural alteration in the lower back due to the incident of 1/24/05. The possible need for back surgery preexisted 1/24/05 and was not significantly altered on 1/24/05. There is no documentation of a permanent aggravation at that time.[3]

Conversely, claimant presented a medical report from Dr. Kirk Bliss, who has treated claimant for several years. That report indicated he believes claimant's current need for medical treatment, including surgery, was directly related to the January 24, 2005, incident at work as it aggravated a preexisting back condition.

Although it is true claimant has a history of chronic back problems and that surgery had been suggested, the evidence establishes that the January 24, 2005, incident aggravated claimant's low back condition. Therefore, that accident is compensable under the Workers Compensation Act.

No standard of health is required by the Workers Compensation Act and a worker is not to be denied benefits merely because of a preexisting physical condition.[4]

> The act prescribes no standard of health for workmen, and where a workman is not in sound health but is accepted for employment, and a subsequent industrial accident suffered by him aggravates his condition resulting in disability, he is not to be denied compensation merely because of a pre-existing physical condition. In other words, it is well settled that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[5]

Accordingly, for preliminary hearing purposes the Board finds claimant's present need for medical treatment is related to his January 2005 accident at work. Therefore, the May 2, 2006, Order should be affirmed.

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[3] P.H. Trans. (May 2, 2006), Cl. Ex. 1.

[4] *Strasser v. Jones*, 186 Kan. 507, 350 P.2d 779 (1960).

[5] *Id.* at 511.

Respondent and its insurance carrier seem to argue in their brief that the January 2005 incident must be the sole cause of claimant's condition and need for medical treatment before he would be entitled to those benefits. But the Board disagrees with that proposition. As indicated above, if an accident aggravates, accelerates, or intensifies a preexisting condition, an injured worker may receive benefits for that accident.[6] In other words, an accident that contributes to a preexisting condition or that contributes to the need for medical treatment is compensable under the Workers Compensation Act with any appropriate credits addressed at the time of the final award.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.[7]

WHEREFORE, the Board affirms the May 2, 2006, Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of July, 2006.

BOARD MEMBER

c: J. Shawn Elliott, Attorney for Claimant
Jennifer Arnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[6] See *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978), and *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[7] K.S.A. 44-534a(a)(2).